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 GROUP, INC., f/k/a DRUGMAX, INC., a Nevada corporation and  
 Cross-Complainant FAMILYMEDS, INC., a Connecticut  
 corporation

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 OAKLAND DIVISION

MCKESSON CORPORATION, a Delaware  
 corporation,

Plaintiff,  
 v.

FAMILYMEDS GROUP, INC., f/k/a  
 DRUGMAX, INC., a Nevada corporation,

Defendant.

FAMILYMEDS GROUP, INC., f/k/a  
 DRUGMAX, INC., a Nevada corporation,

Counterclaimant,  
 v.

MCKESSON CORPORATION, a Delaware  
 corporation,

Counterdefendant.

FAMILYMEDS, INC., a Connecticut  
 corporation,

Cross-Complainant,  
 v.

MCKESSON CORPORATION, a Delaware  
 corporation,

Cross-Defendant.

CASE NO. CV07-5715 WDB

**(Proposed) ORDER RE MOTION FOR  
 SUMMARY JUDGMENT OR, IN THE  
 ALTERNATIVE, SUMMARY  
 ADJUDICATION BY MCKESSON  
 CORPORATION**

**Accompanying papers:** Memorandum of Points  
 and Authorities; Kenefick Declaration; Tregillis  
 Declaration; Separate Statement; Mercadante  
 Declaration; and Evidentiary Objections

Time: August 20, 2008  
 Date: 1:30 p.m.  
 Place: Ctrm. 4  
 1301 Clay St., 3d Floor  
 Oakland, CA  
 Judge: The Hon. Wayne D. Brazil

Complaint filed: Nov. 9, 2007  
 Counterclaim filed: Dec. 17, 2007  
 Cross-Complaint Filed: Dec. 17, 2007  
 Trial date: none set

1 This Court, having considered the Motion for Summary Judgment or, in the Alternative,  
2 Summary Adjudication by McKesson Corporation ("**McKesson**") (the "**Motion**"), as well as the  
3 pleadings and papers on file herein, and the oral argument of the parties, hereby orders as follows:

4 **I. MCKESSON'S CLAIM FOR BREACH OF CONTRACT:**

5 The Court finds as follows in connection with McKesson's first and only cause of action for  
6 Breach of Contract against Familymeds Group, Inc. ("**FM Group**"):

7 1) The evidence submitted by McKesson in support of this Motion is incomplete,  
8 contains significant internal inconsistencies, and fails to demonstrate the absence of any triable  
9 issue of material fact as to whether McKesson has been harmed in any ascertainable amount; and

10 2) A triable issue of material fact exists as to the whether McKesson suffered damages  
11 as the result of Familymeds Group, Inc.'s ("**FM Group**") alleged breach of the terms of that certain  
12 written Supply Agreement by and between FM Group on the one hand, and McKesson on the other,  
13 and dated February 2, 2007 (the "**Supply Agreement**").

14 Accordingly, this Court DENIES McKesson's Motion as to its first cause of action for  
15 Breach of Contract.

16 **II. FM GROUP'S CLAIM FOR SPECIFIC PERFORMANCE OF CONTRACT**

17 The Court finds as follows in connection FM Group's First Claim for Relief for Specific  
18 Performance contained in its Counterclaim for Specific Performance of Contract and Accounting;  
19 Cross-Complaint for Accounting seeking an accounting under contract and in equity filed in this  
20 Action on December 17, 2007 (the "**Counterclaim**"):

21 1) It is necessary, in order to make the Supply Agreement reasonable, to read into the  
22 Supply Agreement the implied term that McKesson will provide to FM Group an accounting of all  
23 transactions occurring thereunder. Civil Code § 1655; Citron v. Franklin, 23 Cal.2d 47, 57 (1943).

24 This Court therefore, pursuant to its inherent authority, grants Partial Summary Judgment in  
25 favor of FM Group on its First Claim for Relief for Specific Performance contained in the  
26 Counterclaim, and therefore orders McKesson to provide to FM Group an accounting under the  
27 Supply Agreement. Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986).

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1 **III. FM GROUP'S CLAIM FOR AN ACCOUNTING IN EQUITY**

2 The Court finds as follows in connection FM Group's Second Claim for Relief for an  
3 Accounting in Equity contained in the Counterclaim:

4 1) The accounts between McKesson and FM Group are so complicated that an ordinary  
5 legal action demanding a fixed sum is impracticable;

6 2) McKesson is obligated to FM Group for offsets, overcharges, and pricing  
7 discrepancies in an amount to be determined by an accounting;

8 3) The information necessary to conduct an accounting is in the exclusive possession,  
9 custody, and control of McKesson; and

10 4) It is therefore appropriate for this Court to order McKesson to provide to FM Group  
11 an accounting in equity under the Supply Agreement. See Civic Western Corp. v. Zila Industries,  
12 Inc., 66 Cal.App.3d 1, 14 (1977).

13 Accordingly, pursuant to this Court's inherent authority, this Court grants Partial Summary  
14 Judgment in favor of FM Group on its Second Claim for Relief for an Accounting in Equity  
15 contained in it Counterclaim, and therefore orders McKesson to provide to FM Group an accounting  
16 under the Supply Agreement. Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986).

17 **IV. FM INC.'S CLAIM FOR AN ACCOUNTING IN EQUITY**

18 The Court finds as follows in connection Familymeds, Inc.'s ("FM Inc.") Third Claim for  
19 Relief for an Accounting in Equity contained in the Counterclaim:

20 1) The accounts between McKesson and FM Group are so complicated that an ordinary  
21 legal action demanding a fixed sum is impracticable;

22 2) McKesson is obligated to FM Group for offsets, overcharges, and pricing  
23 discrepancies in an amount to be determined by an accounting;

24 3) As a result of McKesson's involvement in the negotiation, drafting, and servicing of  
25 the transactions occurring under that certain First Amendment to Prime Warehouse Supplier  
26 Agreement dated December 27, 2005, and by and between DrugMax, Inc., FM, Inc., and D&K  
27 Healthcare Resources, Inc. (the "**First Amendment**"), the information necessary to conduct an  
28 accounting is in the exclusive possession, custody, and control of McKesson; and

1           3)       It is therefore appropriate for this Court to order McKesson to provide to FM Inc. an  
2 accounting in equity under the First Amendment. See Civic Western Corp. v. Zila Industries, Inc.,  
3 66 Cal.App.3d 1, 14 (1977).

4           Accordingly, pursuant to this Court's inherent authority, this Court grants Partial Summary  
5 Judgment in favor of FM Inc. on its Third Claim for Relief for an Accounting in Equity contained in  
6 it Counterclaim, and therefore orders McKesson to provide to FM Inc. an accounting under the First  
7 Amendment. Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986).

8 IT IS SO ORDERED.

9  
10 DATED: \_\_\_\_\_

\_\_\_\_\_  
THE HONORABLE WAYNE D. BRAZIL of the  
United States District Court

JMBM  
Jeffer Mangels  
Butler & Marmaro LLP